DIVISION ONE
FILED: 11-30-2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ST. JOHNS USD NO. 1,	)	No. 1 CA-IC 10-0026
	)	
Petitioner Employer,	)	DEPARTMENT A
	)	
ARIZONA SCHOOL ALLIANCE,	)	**MEMORANDUM DECISION**
	)	
Petitioner Carrier,	)	(Not for Publication –
	)	Rule 28, Arizona Rules
v.	)	of Civil Appellate
	)	Procedure)
THE INDUSTRIAL COMMISSION OF ARIZONA,	)	
	)	
Respondent,	)	
	)	
DENISE LOCKE,	)	
	)	
Respondent Employee.	)	
	)	

Special Action – Industrial Commission

ICA Claim No. 20080-460169

Carrier Claim No. 2008013330

Administrative Law Judge Joseph L. Moore

AWARD AFFIRMED

Klein, Lundmark, Barberich & LaMont P.C. Phoenix
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Attorneys for Petitioners Employer and Carrier

Andrew Wade, Chief Counsel Phoenix
The Industrial Commission of Arizona
Attorney for Respondent

The Porter Law Offices, P.C. Show Low

By G. Terris Porter
Attorneys for Respondent Employee

B A R K E R, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for permanent total disability benefits. Four issues are presented on appeal:

> (1) Whether the administrative law judge ("ALJ") erroneously considered the respondent employee's ("claimant's") subjective physical complaints in determining her residual earning capacity;
>
> (2) Whether the ALJ erroneously considered commuting costs when determining the claimant's loss of earning capacity ("LEC");
>
> (3) Whether the ALJ erroneously failed to consider full-time employment in establishing the claimant's LEC; and
>
> (4) Whether the ALJ relied on foundationally inadequate labor market testimony in establishing the claimant's LEC.

Because we find the LEC award to be supported by sufficient evidence of record, we affirm.

I. JURISDICTION AND STANDARD OF REVIEW

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2003), 23-951(A) (1995), and Arizona Rules of Procedure for Special Actions 10. In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings, but review questions of law de novo. *Young v.*

Indus. Comm'n, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). We consider the evidence in a light most favorable to upholding the ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

II. PROCEDURAL AND FACTUAL HISTORY

¶3 On January 14, 2008, the claimant was employed as a janitor by the petitioner employer, St. Johns Unified School District. While performing her job duties, the claimant developed a gradual injury to her right shoulder from the repetitive use of her right arm. She filed a workers' compensation claim, which was denied for benefits by the petitioner carrier, Arizona School Alliance ("Arizona"). The claimant timely protested the denial of her claim, and Arizona obtained an independent medical examination ("IME") with Irwin Shapiro, M.D. Based on Dr. Shapiro's report, Arizona rescinded its denial and accepted the claim for benefits.

¶4 Prior to her claim's acceptance, the claimant underwent surgery to repair a torn right rotator cuff. Her right shoulder condition subsequently became stationary with a six percent unscheduled permanent partial impairment. The claimant and Arizona submitted position statements to the ICA with regard to the claimant's residual earning capacity. The ICA then entered its findings and award for a six percent unscheduled permanent partial impairment and no LEC.

¶5 The claimant timely protested the ICA's award, and hearings were held for testimony from the claimant and two labor market experts. Following these hearings, the ALJ entered an award for a total LEC. Arizona timely requested administrative review, but the ALJ summarily affirmed his Award. Arizona next brought this appeal.

III. DISCUSSION

¶6 When establishing a claimant's LEC, the object is to determine as nearly as possible whether the claimant can sell his services in the open, competitive labor market, and if so, for how much. *Davis v. Indus. Comm'n,* 82 Ariz. 173, 175, 309 P.2d 793, 795 (1957). The initial burden of proving an LEC is on the claimant. *Franco v. Indus. Comm'n,* 130 Ariz. 37, 39, 633 P.2d 446, 448 (App. 1981).

¶7 The claimant can meet this burden by presenting evidence of her inability to return to date-of-injury employment and by making a good faith effort to obtain other suitable employment or by presenting testimony from a labor market expert to establish residual earning capacity. *See D'Amico v. Indus. Comm'n,* 149 Ariz. 264, 266, 717 P.2d 943, 945 (App. 1986). If there is testimony that these efforts were made and were unsuccessful, the burden of going forward with contrary evidence then shifts to the employer and carrier. *See Zimmerman v. Indus. Comm'n,* 137 Ariz. 578, 580, 672 P.2d 922, 924 (1983).

¶8 In order to establish residual earning capacity, there must be evidence of job opportunities which are (1) suitable, i.e., which the claimant would reasonably be expected to perform considering her physical capabilities, education, and training; and (2) reasonably available. *Avila v. Indus. Comm'n*, 219 Ariz. 56, 60, ¶ 14, 193 P.3d 310, 314 (App. 2008).

¶9 In this case, the parties agreed that the claimant could not return to her date of injury employment. The claimant testified regarding her unsuccessful attempts to find new employment, and she presented labor market testimony from Gretchen Bakkenson. Arizona presented labor market testimony from Nathan Dean.

A. Subjective Physical Complaints

¶10 Arizona first argues that the ALJ's Award should be reversed because he relied on the claimant's subjective physical complaints, which were unsupported by medical evidence, to establish her LEC. The basis for this argument appears to be one or both of the following excerpts. The first excerpt is from the testimony of claimant's labor market expert, Ms. Bakkenson:

> Q. [By Mr. Porter] What conclusions did you arrive at with respect to Ms. Locke's loss of earning capacity?
>
> A. . . . .
>
> [Ms. Bakkenson] I felt that a 57-mile to 79-mile commute was excessive given her low average monthly wage and part-time hours, and so I felt that in combination with the physical restrictions as opined by . . . .
>
> . . . .

> -- Shapiro, sorry, and the radical restrictions she had from the 1998 industrial incident in California, that along with her -- the relevant labor market that she had suffered a total loss of earning capacity.

The second excerpt is from claimant's hearing testimony:

> Q. [By Mr. Porter] You indicated that at one point you would have been willing to go to Show Low to work at Lowe's. Has anything changed since then that would give you concern about doing that?
>
> A. [Claimant] Yeah, my carpal tunnel in my hand is really bad. I have a hard time holding things . . . .
>
> Q. You indicated that you used to have a job that involved typing reports. Do you feel you'd be able to do the typing reports [sic]? From your experience with doing that before, do you think you could do it now?
>
> A. No, I can't do that.
>
> Q. Why not?
>
> A. Because it hurts my carpal tunnel. It hurts my upper back.

¶11 We agree with Arizona that a lay person cannot accurately diagnosis or describe a condition's etiology. *Western Bonded Prods. v. Indus. Comm'n,* 132 Ariz. 526, 527, 647 P.2d 657, 658 (App. 1982). Likewise, we agree that the ALJ should exclude a disability, as in *Hoppin*, that was not pre-existing and unrelated to the industrial injury. *Hoppin v. Indus. Comm'n*, 143 Ariz. 118, 125, 692 P.2d 297, 304 (App. 1984). Here, however, neither error existed. As set forth in more detail in section III. D., *infra*, the factual basis was present for the ALJ's decision as to limitations to be based on Dr. Shapiro's medical report. Nothing

in the ALJ's decision persuades us otherwise. Accordingly, there was no error on this ground.

B. Commuting Costs

¶12 Arizona next argues that the ALJ should not have considered the claimant's cost of commuting when he determined her average monthly wage. The basis for this argument is the difference of opinion between the labor market experts as to the appropriate geographical labor market in this case.

¶13 A claimant's earning capacity must be assessed with reference to her "area of residence," which includes the area where the employee lived and worked at the time of the industrial injury and any area to which the employee relocated thereafter. *See Arizona Workers' Compensation Handbook*, § 7.4.2.4 at 7-24 (Ray J. Davis, et al., eds.; 1992); *Zimmerman,* 137 Ariz. at 581, 672 P.2d at 925. This is known as the relevant geographical labor market. We previously have addressed this issue in *Kelly Services v. Industrial Commission,* 210 Ariz. 16, 106 P.3d 1031 (App. 2005).

> [T]he more appropriate inquiry for determining whether a particular labor market (not requiring a change in residence) is within a claimant's "area of residence" is whether a reasonable person in the claimant's situation would probably seek employment there. In making such a determination, a totality of the circumstances approach, in which all relevant factors are considered, should be used. By way of example only, relevant considerations in determining whether a potential job lies within a person's geographical labor market area would typically include *availability of transportation*, *duration of commute, and the length of workday.* . . . It would also include the ability of the person to make the commute based on his physical

condition. . . .

210 Ariz. at 20, 106 P.3d at 1035 (citations omitted) (emphasis added). We also have recognized that travel expenses may be a relevant consideration when considering the geographical labor market. *See, e.g., Ihle v. Indus. Comm'n,* 14 Ariz. App. 463, 465, 484 P.2d 232, 234 (1971) ("When a disabled workman voluntarily expands his employment efforts to an area distant from the place of his pre-injury employment [50 miles in this case], but maintains his pre-injury place of residence, . . . the Commission can and should consider the attendant work-connected travel expenses in determining his post-injury earning capacity.").

¶14 In this case, the claimant both lived and worked in St. Johns at the time of her injury. Ms. Bakkenson testified that in her opinion, the relevant geographic labor market for St. Johns included Springerville and Eager. According to the distance chart stipulated into evidence, Springerville was 29.92 miles and Eager was 30.58 miles from St. Johns. Mr. Dean testified that in his opinion, the relevant geographical labor market also would include Show Low, Pinetop, Lakeside, and Holbrook. The closest of these was Show Low, 45.22 miles from St. Johns.

¶15 After considering the evidence and the labor market testimony, the ALJ found:

> While there is in this record evidence upon which it could be concluded that the labor market applicable to determining the post-injury earning capacity of a worker who both resided and was employed in St. Johns, Arizona, would have also

> included a number of distant, larger communities, such as the Show Low/Pinetop/Lakeside area, I conclude that applicant's labor market expert, Ms. Bakkenson, is correct in concluding that such communities are outside the geographic limits of the labor market in this case. Moreover, assuming the reasonable availability of suitable clerical positions in any of the communities that were the subject of Mr. Dean's labor market survey, the travel-related expenses in conjunction with those positions would leave applicant with a negative earnings, as measured by her average monthly wage.

¶16 As with most expert opinions, the trier of fact is entitled to consider the testimony of the labor market expert, but gives it only the weight to which he deems it is entitled. *LeDuc v. Indus. Comm'n*, 116 Ariz. 95, 98, 567 P.2d 1225, 1227 (App. 1977). Further, it is the ALJ's duty to resolve all conflicts in the evidence and to draw all warranted inferences. *Malinski v. Indus. Comm'n,* 103 Ariz. 213, 217, 439 P.2d 485, 489 (1968).

¶17 In this case, the ALJ concluded that under Ms. Bakkenson's proposed geographic labor market, there was no suitable and reasonably available employment for the claimant. Under Mr. Dean's proposed geographic labor market, it would cost the claimant more to commute than she would earn. Based on this evidence, we believe that the ALJ could reasonably find that the claimant had sustained a geographic total LEC.

C. Considering Full-Time Employment

¶18 Arizona next argues that the ALJ erred by failing to consider the viability of full-time employment, because those

positions could have been scaled back under *Elias v. Industrial Commission,* 175 Ariz. 507, 858 P.2d 652 (App. 1992), to establish part-time employment. If the ALJ had done so, Arizona asserts that the commuting expenses would not have made the positions unavailable.

¶19 Determining a claimant's LEC involves a comparison of the claimant's pre-injury average monthly wage with her post-injury earning capacity. *See* A.R.S. § 23-1044(C). In *Elias*, we held that the statutorily-mandated comparison must be made using the same standard or "yardstick." 175 Ariz. at 509, 858 P.2d at 654. This reciprocity principle is known as the "equal measure rule." This rule has been applied to ensure that when comparing the average monthly wage and post-injury earning capacity, the courts adjust for inflation and consider factors such as the length of the claimant's work week, the number of hours worked, the regularity of the work, and whether compensation includes or excludes expenses associated with the job (such as travel). *Schuck & Sons Constr. v. Indus. Comm'n*, 213 Ariz. 74, 78-79, ¶ 19, 138 P.3d 1201, 1205-06 (App. 2006).

¶20 Initially, we note that Arizona's counsel recognized on the record at the hearing:

> Q. [By Mr. Lundmark] This lady is not limited to a part-time work schedule. She may be limited in terms of worker's comp. analysis, but she is not limited to a part-time schedule, is she?
>
> A. [By Ms. Bakkenson] Not by Shapiro.

In that regard, when a claimant's average monthly wage is based on part-time work, the equal measure rule requires that post-injury earning capacity also be based on part-time work. *Elias*, 175 Ariz. at 509, 858 P.2d at 654.

¶21 In this case, the claimant medically was capable of working full time according to Dr. Shapiro. But in fact, at the time of her injury, she was working part time and her average monthly wage was based on part-time employment. For that reason, the equal measure rule requires her post-injury earning capacity to be based on part-time employment. We agree that if the claimant were working full time, the travel expenses of commuting to an outlying area would not make the work economically unfeasible. But in this case, it does not change the fact that to do so for part-time employment would. The current state of our law does not permit us to essentially require that in order to receive benefits a claimant must work full time when she only worked part time prior to injury. This remains true regardless of whether the claimant is physically capable of full-time employment or not.

D. Foundation for Ms. Bakkenson's Testimony

¶22 Arizona last argues that the ALJ erred by relying on Ms. Bakkenson's foundationally inadequate testimony. The basis for the argument is that Ms. Bakkenson relied on the claimant's unsupported medical limitations in reaching her opinion. The labor market expert's role in determining an LEC is to receive medical input

from the treating physicians regarding the claimant's physical capabilities and to match those capabilities with requirements of specific jobs in the open labor market. *See Tucson Steel Div. v. Indus. Comm'n*, 154 Ariz. 550, 556, 744 P.2d 462, 468 (App. 1987).

¶23 In this case, both labor market experts relied on Dr. Shapiro's determination of physical limitations in rendering their expert opinions. In his IME report, Dr. Shapiro recognized:

> **MEDICAL HISTORY**: is significant. She apparently had thyroid cancer and underwent a thyroidectomy in 1979. She has had lumbosacral disk surgery. She had a left knee arthroscopy in 1979 and a left total knee arthroplasty in May of 2007. She also had a hysterectomy. With regards to the right shoulder, however, she was involved in a motor vehicle accident in approximately 1998 and apparently underwent right shoulder arthroscopic procedure by Dr. Pang in Fremont, California indicating that it was a "clean up." By a year later, she states she was asymptomatic and had no further difficulties with the right shoulder. She had full motion, full strength. In 2000, she also underwent an anterior cervical fusion supposedly as a result of the motor vehicle accident. She also has a heart murmur with no cardiac meds.

Based on Dr. Shapiro's testimony, Ms. Bakkenson testified:

> Q. BY MR. PORTER: Would you be able to testify with respect to her loss of earning capacity considering Dr. Shapiro's limitations without giving weight to the subjective limitations from a prior injury?
>
> A. [Ms. Bakkenson] Yes.
>
> Q. Okay. I will ask you to do that then, please.
>
> A. Okay.
>
> Q. And with that limitation does that change at all your conclusions with respect to having a total loss of earning capacity?
>
> A. No.

¶24 Because Ms. Bakkenson was able to reach her conclusion without reference to claimant's subjective complaints, we conclude that Ms. Bakkenson's expert testimony was foundationally sufficient.

IV. CONCLUSION

¶25 For all of the foregoing reasons, we affirm the award.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
DONN KESSLER, Presiding Judge

/s/
_____
JON W. THOMPSON, Judge